

NTSB Order No. EA-4083

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of February, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

V.

WILLIAM R. FERGUSON,

Respondent .

Docket SE-12353

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty issued at the conclusion of an evidentiary hearing held on May 28, 1992.¹ By that decision, the law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate for 45 days on allegations of violations of sections

¹A copy of the hearing transcript containing the law judge's "oral initial opinion" and order is attached to this decision.

91.103(b), 91.119(c), and 91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.²

The Administrator's order, which served as the complaint in this matter, alleged that on June 13, 1991, respondent departed Livingston Mission Field, Montana, at 8:28 a.m., without first familiarizing himself with a Notice to Airmen [NOTAM] which had been issued at 8:06 a.m. that day advising that there were men

²FAR §§ 91.103(b), 91.119(c), and 91.13(a) provide in pertinent part as follows:

§ 91.103 Preflight action.

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight. This information must include....

(b) For any flight, runway lengths at airports of intended use, and the following takeoff and landing distance information:

(1) For civil aircraft for which an approved Airplane or Rotorcraft Flight Manual containing takeoff and landing distance data is required, the takeoff and landing distance data contained therein, and

(2) For civil aircraft other than those specified in paragraph (b)(1) of this section, other reliable information appropriate to the aircraft, relating to aircraft performance under expected values of airport elevation and runway slope, aircraft gross weight, and wind and temperature.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes....

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

and equipment working on Runway 04/22. As a result, the order further alleged, respondent operated his aircraft closer than 500 feet to a person and equipment which were situated at the east end of the runway.

Respondent is the fixed-base operator at Livingston Mission Field, which is an uncontrolled airport. The Federal Aviation Administration (FAA) operates a Flight Service Station (FSS) at Livingston Mission Field which opens each day at 8:00 a.m. On the day in question, respondent commenced agricultural spray operations at approximately 5:00 a.m. Prior to that departure he called the Great Falls FSS and obtained a pre-flight weather briefing. He also determined that no NOTAMS had been issued for the local area. By 8:00 a.m. respondent had conducted at least three spraying operations. Between each operation he returned to Livingston Mission Field to refill his spray tanks and refuel the aircraft. At approximately 8:12 a.m., respondent was observed refueling his aircraft. Respondent then taxied to the runway. He admits that as he taxied out, he saw a pickup truck at the end of the runway. He claims that he believed the vehicle would drive off before he took off, but in fact the vehicle remained stationary. Respondent claims that he rotated (lifted off) at 3900 feet down the runway (which is 5700 feet in length), and that he did not operate over the pickup truck.

The FAA flight service station specialist stationed at the Livingston FSS, William Evans, testified that during the week of June 10th airport improvements were being made by order of the

airport board. On the day in question, he arrived at work at 7:48 a.m. At 8:06 a.m. the airport maintenance supervisor, Edward Wilson, asked Mr. Evans to issue a local NOTAM advising that men and equipment would be working on Runway 04/22. It is undisputed that the NOTAM was properly issued.

Mr. Evans testified that after issuing the NOTAM he watched the maintenance supervisor proceed down the runway in his pickup truck. Evans heard an aircraft engine start, and he testified that he observed respondent's departure roll. He claims that respondent appeared to rotate in the vicinity of the VASI [visual approach slope indicator], which was in close proximity to the men and equipment. He described respondent's takeoff roll as "longer than normal." From Evans' vantage point, respondent seemed to operate within 500 feet of the maintenance supervisor and his equipment which were located at the departure end of the runway.

Mr. Wilson, the maintenance supervisor, testified that he drove past respondent as he was refueling his aircraft, but he said nothing about the work he was about to perform at the end of the runway because he had previously been instructed by the airport board to avoid confrontations with respondent. He testified that he was painting the numbers on the end of the runway when he heard an aircraft motor and glanced up. He claims that respondent flew over his head, and that the right wing tip of respondent's aircraft came within 20 to 60 feet of him. When respondent landed at 9:15 a.m. he entered the FSS and complained

about the men and equipment on the runway. According to Mr. Evans, he informed respondent that a NOTAM had been issued at 8:06 a.m. Respondent admits that he did not check with the Livingston FSS after it had opened at 8:00 a.m. He testified that he believed that the pre-flight call he made at approximately 5:30 sufficed, since there had been no changes in the weather.

The administrative law judge found that respondent failed to avail himself of the available information before his departure from Livingston Mission Field at 8:25 a.m. He specifically rejected respondent's contention that he complied with the FAR by calling before he commenced operations at 5:00 a.m., finding that each time respondent came back, refueled, and took off, he began a separate and distinct flight. As to the remaining violations, the law judge found that the testimony of Mr. Wilson and Mr. Evans was more credible, and he therefore determined that respondent operated his aircraft closer than 500 feet to persons and vehicles on the runway, and that this overflight was not necessary for purposes of the takeoff because respondent should have lifted off sooner or aborted the takeoff in order to avoid creating the potential for endangerment to the worker and his vehicle.

Respondent raises three issues on appeal. He asserts that the law judge abused his discretion by not allowing him to impeach the credibility of one of the Administrator's witnesses with testimony on incidents reflecting their dislike of one

another. He also claims that the law judge determined the outcome of the matter before hearing all the evidence. Finally, he argues that the law judge erred in allowing the Administrator to amend the order to allege that respondent failed to familiarize himself with NOTAM L0603, instead of NOTAM L0602.³ We find no merit to these issues. For the reasons that follow, we deny the appeal.

The Board has reviewed the record, and we find that there is ample evidence as to the nature of the relationship between respondent and Mr. Wilson. Indeed, Mr. Wilson testified that he was told by the airport board to avoid confrontations with respondent.⁴ Nonetheless, the law judge, having heard and seen the witnesses, found Mr. Wilson's testimony, which was corroborated by an FAA employee's observations, more credible. We have no reason to disturb that finding. Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (Credibility determinations are generally within the exclusive province of the law judge and will not be disturbed in the absence of arbitrariness, capriciousness, or some other compelling reason). In any event, the law judge did not preclude the introduction of relevant evidence into the record. He instructed respondent's counsel to ask Mr. Wilson very specific questions which related to the proper issuance of

³The Administrator has filed a brief in reply, urging the Board to deny the appeal.

⁴Perhaps for this reason, Mr. Wilson did not tell respondent that he intended to park at the end of the runway, when he most likely knew that respondent would soon take off since he was refueling the aircraft at the time Wilson drove past him.

the NOTAM or which attacked the credibility of the witness. When respondent's counsel insisted on going beyond these parameters the law judge properly exercised his discretion by precluding further inquiry into what we agree were irrelevant matters.

As to respondent's claim that the law judge determined the outcome of this matter before hearing all of the evidence, respondent's complaint evidences what we think may be his unfamiliarity with our Rules of Practice, which provide that a law judge may render an initial decision orally, at the close of the hearing. 49 C.F.R. § 821.42(a). In any event, the oral decision here clearly shows that the law judge considered all of the evidence, both oral and documentary, which was introduced by both parties to the proceeding. For example, in analyzing respondent's conduct, the law judge specifically discussed respondent's testimony that he believed that the information he had obtained at 5:00 a.m. satisfied the requirements of the regulation. The law judge rejected this explanation because he ruled, as a legal conclusion, that a pre-flight was necessary before each operation. Later in his factual analysis, he again refers to respondent's testimony regarding the question of whether respondent saw Mr. Wilson's truck at the end of the runway as he took off. Referring to the pictures introduced by the Administrator which showed that the runway was level and that it had no obstructions, the law judge concluded that respondent's testimony was "somewhat difficult" to accept. (Oral decision at page 12). In sum, we think respondent's claim lacks merit.

Finally, respondent argues that the law judge erred by allowing the Administrator to amend the complaint at the hearing to correct a typographical error by citing the relevant NOTAM as L0603, rather than L0602. We find respondent's assertion unavailing. Respondent claims that up until the day of the hearing he believed he could defend himself by proving that he had obtained NOTAM L0602, which he claims he obtained the day before the incident. However, respondent was told of the existence of NOTAM L0603 on the day of the incident, when he entered the FSS after the flight and was told by Mr. Evans that a NOTAM had been issued at 8:06 that morning. Moreover, the complaint clearly gave notice that the NOTAM relevant to this proceeding was issued on June 13, 1991, at 1406 UTC [8:06]. Finally, the record shows that respondent's counsel was provided a copy of the correct NOTAM during discovery. We fail to see how respondent was prejudiced by the amendment of the complaint at the hearing, under these circumstances.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied, and
2. The 45-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁵

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

⁵For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).